No. 8408

United States
Circuit Court of Appeals
For the Ninth Circuit

C. E. HULL, Receiver of The Nogales National Bank of Nogales, Arizona, a national banking association,

Appellant,

vs.

SANTA CRUZ COUNTY, a body politic and corporate,

Appellee.

Reply Brief for Appellant

Upon Appeal From the District Court of the United States for the District of Arizona

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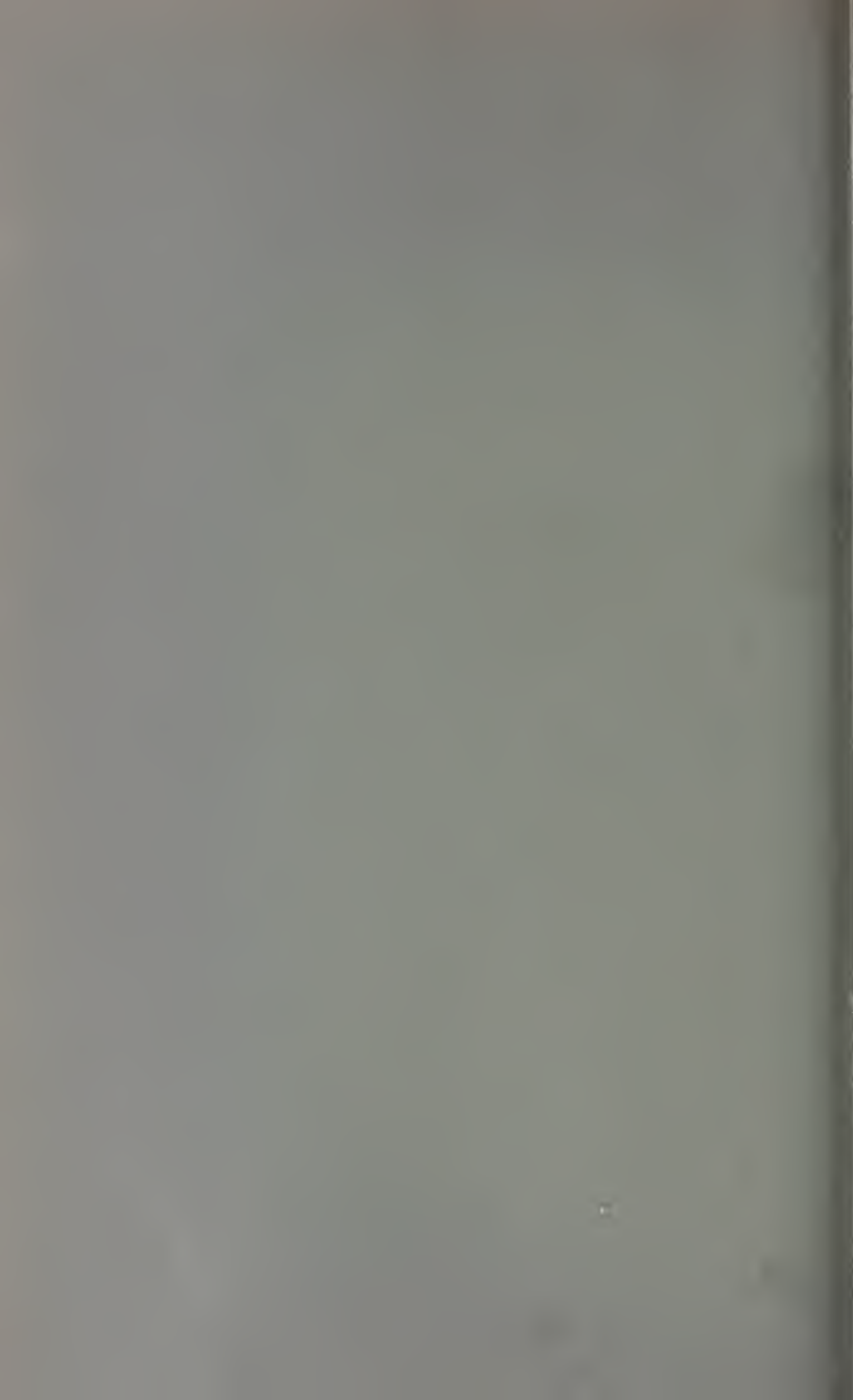

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May It Please the Court:

It would appear that the issues in this case have been narrowed down to the sole question—did the passage of the Amendatory Act of June 25, 1930, validate

an illegal pledge made in 1928, as to deposits made prior to June 1, 1928.

Was it the intention of Congress to validate a hitherto illegal and void pledge or was it a new grant of power as to the future? It is difficult to tell how much Congressmen knew of banking practices but there is no evidence whatsoever that they intended the Amendment to be retroactive in its application. It is obvious that Congress knew the original act had not given National Banks power to pledge assets for the Supreme Court said in Texas & Pacific Ry. v. Pottorf, 291 U. S. 245, 258, 54 S. Ct. Rep.:

> "This amendment indicates that Congress believes that the original act had not granted general power to pledge assets to secure deposits. The fact that the amendment was made to Section 45 indicated that the power to pledge was granted only as an incident of the public officers duty to demand a pledge. If, as is suggested, the 1930 Amendment was passed merely in order to settle doubts as to the power of a National Bank to pledge its assets to secure deposits, the amendment would have been made, not to Section 45 but to Section 8 which contains the grant of incidental powers."

and quoted from the 72 Congressional Record 6243 as follows: Senator Thomas, in introducing the bill said:

> "It is a bill *simply to confer* on a National Bank the same opportunity for the giving of security for the safe keeping and prompt payment of State and County moneys, as is authorized with reference to State banking institutions." (Italics mine.)

The expression *simply to confer* cannot be interpreted to mean "and to validate illegal pledges previously made." It is earnestly urged that there is not the faintest suggestion of an intention to pass a validating or retroactive statute. The expression *simply to confer* narrows and restricts its meaning.

The case of Lewis v. Fidelity & Dep. Co., 292 U. S. 559, relied upon by appellee, the court virtually said that the Amendment was not intended to be retroactive when it said "a statute is not retroactive merely because it draws on antecedent facts for its operation" continuing it said, "The appointment of the depository was within the power of the State to confer and the bank to accept but by reason of the paramount Federal Law the pledge could not arise. When that obstacle was removed by the amendment the original agreement could as to the future be given the effect intended by the parties and *the lien become operative as to deposits thereafter made.* (Italics mine.) It is a far cry from the Lewis case where all of the deposits were made after the passage of the act to the case at bar where both the pledge and the deposits were made over two years prior to the passage of the Act. The court in the Lewis case specifically declined to pass on the question raised in the case at bar.

The antecedent facts to which reference was made by the Supreme Court were the fact of the existence of an unexpired pledge for a definite term of years made before the operative date of the amendment and extending from a definite period beyond the operative

date of the amendment. The fact that the funds were entirely withdrawn, redeposited and added to after the passage of the Act in the Lewis case presents a situation utterly different from our own. The Lewis case is discussed at length in appellant's brief on pages 20, 21, 27 and 28 to which reference is now made.

In Cox v. Hart, 260 U. S. 427, 435, was involved a proviso exempting squatters on public land from the operation of a general prohibition. The Court pointed out that the one purpose of the provision was to exclude from the operative effect of the new rule cases which might have arisen under the prior law. It was plainly intended to be retrospective.

Jones v. New York Guaranty & Indemnity Co., 101 U. S. 622, 627 cited by appellee on page 7, turned on the power of a corporation chartered by the state.

Ewel v. Daggs, 108 U. S. 143, quoted by appellee was on a question as to whether or not the repeal of the usury statute made a debt hitherto uncollectible, because of usury, thereafter collectible. The court said that a usury statute "was in its nature a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause operated retrospectively." There can be no proper application of that case to the one at bar.

Kavanaugh v. Fash, 74 F. (2d) 435, quoted by appellee on page 8 simply is not in point as appellant has

pointed out on page 33 of appellant's brief.

Reynolds v. United States, 292 U. S. 443, 54 S. Ct. 800, 78 L. Ed. 1353 quoted by appellee is not at all in point. That case involved the right of a United States hospital to deduct from a patient's pension a sum for board, maintenance, etc. while hospitalized. Upon the discharge of the patient, one Reynods, a Spanish-American war veteran, in April 1930, the hospital applied the sum of $3259.17, the amount remaining from his pension after payment for clothing and cash advanced.

Section 202 (10) of the World War Veterans' Act, as amended (U. S. C. A., title 38, 484 (38 U. S. C. A., 484)), directs that all hospital facilities under the control and jurisdiction of the Veterans' Bureau shall be available "for every honorably discharged veteran of the Spanish-American . . . suffering from neuropsychiatric . . . ailments," with the following proviso:

> "That the pension of a veteran entitled to hospitalization under this section shall not be subject to deduction, while such veteran is hospitalized in any Government hospital, for board, maintenance, or any other purpose incident to hospitalization."

This proviso appeared for the first time in the Act of July 2, 1926, c. 723, p. 9, 44 Stat. 794.

It is to be noted that the proviso in the act appeared for the first time in the Act of July 2, 1926. The deduction was made in April 1930, *four years after* the proviso prohibiting such deduction became a law. (Italics mine.) It would seem that no further comments are necessary.

In Ross v. Knott, 13 F. Supp. 963 (page 8 appellee's brief) the Florida district judge assumed that the Lewis case was decisive of the question involved in the case at bar. Such seems to have been a hasty and unwarranted conclusion as I have tried to point out on page 27 of appellant's brief.

The decision of the Court below appears to have been largely influenced by the opinion rendered from Florida in the case of Ross v. Knott (supra). In that opinion from Florida there was some reference to some cases suggested in the Lewis case with apparent assumption that those cases bore on the question of deposits made prior to the act. An analysis of those cases suggested in the Lewis case for comparison to determine whether the amendment of June 25, 1930, validated the lien with reference to the deposits made prior to the amendment will disclose that these cases mentioned are wholly inapplicable. In the Lewis case the Court said:

> "We have no occasion to consider whether the Act of June 25, 1930 would have validated the lien as to deposits made before that time. Compare Gross v. United States Mortgage Co., 27 L. Ed. 795; West Side Belt Railroad Co. v. Pittsburgh Construction Co., 55 L. Ed. 107; Charlotte & Northern R. R. Co. v. Wells, 67 L. Ed. 100."

In our opinion the word *compare* does no more than suggest reading and criticism.

While the Court did not decide whether the Act of June 25, 1930, validated the lien as to deposits made

before that time, the Court did hold that if the Act validated the lien as to deposits made after June 25, 1930, that such construction could only result from an application of the Rule of decisions in the cases mentioned. These cases mentioned are totally inapplicable.

The facts in the case of Gross v. United States Mortgage Co., 27 L. Ed. 795, are that on August 22, 1872, one Lombard borrowed $50,000.00 from a nonresident corporation; for the purpose of securing the indebtedness, Lombard gave to the Mortgage Company a mortgage covering property in Chicago; Lombard then conveyed the property in December, 1872 to the National Life Insurance Company, the Insurance Company agreeing to assume the Lombard mortgage in part payment of the purchase price. In part payment, too, the Insurance Company delivered to Lombard its note for $12,273.00, secured by a Deed of Trust covering the property. One Gross became the owner of the $12,273.00 note and the Trust Deed. Lombard and the Insurance Company both became bankrupt. Apparently, under the laws of Illinois in force at the time the mortgage was executed, there was some question as to whether a corporation under the laws of another state could acquire title to real estate in Illinois as security for a loan and in 1875 the General Assembly of Illinois passed an Act that was clearly on its face intended to be retrospective in its operation, providing that a corporation of another state is authorized to lend money in Illinois. It was provided by the statute that "Any such corporation that may have invested or lent money

as aforesaid may have the same rights and powers for the recovery thereof, subject to the same penalties for usury as private persons and citizens of this State."

There was a default in the first mortgage given by Lombard to the mortgage company.

For the purpose of settling conflicting claims to the property, the assignee in bankruptcy of the Insurance Company brought a suit making the United States Mortgage Company, Gross and others defendants. There was involved, among other things, the question as to whether the holder of the first mortgage acquired a good title as against Gross, the holder of the second mortgage. It was conceded by all parties that the 1875 Act was retrospective, but Gross contended that he had acquired the title to the property prior to the enactment of the 1875 Act and that he had, therefore, acquired a vested right of property of which he could not be constitutionally deprived under the 14th Amendment. The Court held that the Act was not unconstitutional even though retrospective.

In the case now on appeal, there is no question as to the constitutionality of the Act of June 25, 1930. The question involved does not turn on the constitutionality of this statute, but the sole question involved is, should the statute be construed retrospectively so as to validate the previous pledge? The Act clearly discloses that no such retrospective construction was intended by the CONGRESS.

The facts in the case of West Side Belt Railroad Co. v. Pittsburgh Construction Co., 55 L. Ed. 107, are that

the plaintiff, a nonresident corporation, had not registered in the State of Pennsylvania, as required by the Statutes of Pennsylvania, as a condition precedent to doing business in that State, and the Court held that because of the plaintiff's failure to register, the plaintiff could not recover under its contract; thereafter a statute was passed by the Legislature of Pennsylvania validating contracts of this nature, the statute being a validating statute was retrospective on its face. The Court then sustained the contract on the strength of the validating statute.

In the case of Charlotte Harbor & Northern R. R. v. Wells, 67 L. Ed. 100, it appears that the Legislature undertook to validate previous action of county commissioners in creating a special road and bridge district lying partly in another road and bridge district. The Act was on its face retrospective.

Generally speaking, it may be said that all of the decisions mentioned for comparison as to the effect of the Amendment of June 25, 1930, upon balances on hand at that time show on their face that they were validating statutes intended to operate retrospectively.

Haynes v. City of Woodward, 6 F. Supp. 270, quoted in appellee's brief at page 11 presents a radically different situation. In that case practically all of the bonds were repledged after the passage of the amendment.

One outstanding feature of this case before the Court is that after all the National Banking Act is the expression of powers granted national banks and of

the intent of Congress as to their powers and regulation. This was pointed out very clearly in the case of Cook County National Bank v. United States, 107 U. S. 445, 448:

> "We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed; the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security and redemption of their notes, the winding up of the institutions and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

How much the Congress that passed the Amendment of June 25, 1930, knew about banking practices is hard to say, but this we do know: The Supreme Court in Texas & Pacific Ry. v. Pottorf, 291 U. S. 245, 258 said clearly:

"This amendment indicates that Congress believes that the original act had not granted general power to pledge assets to secure deposits. The fact that the amendment was made to Section 45 indicates that the power to pledge was granted only as an incident of the public officers duty to demand a pledge. If, as is suggested, the 1930 Amendment was passed merely in order to settle doubts as to the power of a National Bank to pledge its assets to secure deposits, the amendment would have been made, not to Section 45 but to Section 8 which contains the grant of incidental powers."

Senator Thomas, in introducing the bill, stated in the Senate:

"It is a bill simply to confer on a National Bank the same opportunity for the giving of security for the safe keeping and prompt payment of State and County moneys, as is authorized with reference to State banking institutions."
72 Cong. Record, 6243.

It has all the earmarks of an entirely new grant of power.

Appellee on page 14 of its brief states:

"The appellee rests its case upon the law as stated by the Supreme Court in Lewis vs. Fidelity & Deposit Co. of Maryland, supra:

"When that obstacle" (lack of power to give security) "was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties."

but appellee failed to finish the quotation, for the Supreme Court said:

> "When that obstacle was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties; and the *lien became operative as to deposits thereafter made* and is entitled to priority from the date of the Act." (Italics mine.)

In Awotin v. Atlas Exchange Bank, 295 U. S. 209, it was held that one who makes an unlawful contract with a national bank is charged with knowledge of the statutory prohibition against such an agreement, and may not hold the bank to the forbidden contract on the ground of estoppel. In the course of the opinion the court states that contracts made by national banks in violation of statutes relating thereto are invalid, not merely on account of the absence of the power of the bank to enter into the same, but because there is a total prohibition of liability growing out of such a transaction, whatever its form, calling attention to the well-known rule *that national banks are public institutions, and the object of the statute is to protect their stockholders, depositors and the public from the hazards of contingent liabilities.* (Italics mine.)

In re Dearborn's Estate, 2 P. (2d) 93, the question of public policy centuries old was involved and the validation of a marriage by the removal of a previous disability is, as a matter of policy, of vital importance to the people. It is rooted and grounded in the common law. In the matter at bar the situation is decidedly dif-

ferent and to quote Awotin v. Atlas Exchange Bank (supra) the Supreme Court of the U. S. has said: "That national Banks are public institutions and the object of the statute is to protect the stockholders, depositors and the public from the hazards of contingent liabilities." It would be grossly unfair to the stockholders in a bank to have substantial blocks of assets set aside for the benefit of particular depositors for the depositor, generally speaking, would have no knowledge of this segregation of assets for the benefit of particular creditors and there is nothing in the record to indicate that the depositors in the instant case knew anything of this transaction.

Petterson v. Berry, 125 Fed. 902, involved the same principle as Ewel v. Daggs, the effect of repeal of a usury statute a penal statute without a saving clause. The repeal of a penal statute is vastly different in its effect from the enactment of a statute granting a new power to a national bank.

Appellee seems to have overlooked the meat of the decision in Wood v. Imperial Irrigation District, 17 Pac. (2d) 128. The opinion in that case is set out quite fully at pages 50, 51, 52 of appellant's brief. To refer to it briefly: A pledge of assets made by a bank in 1925, to secure funds of the Irrigation District was held by the Court to be illegal for lack of corporate power of the bank to make such a pledge. Two years later a statute was passed specifically authorizing exactly such pledges to such irrigation district, yet the court said that the passage of that statute did not validate the

hitherto illegal pledge. The situation was identical with the case at bar.

The case of Thompson, Rec. v. Twin Falls Highway District, a case decided in the southern district of Idaho on January 11, of this year is practically identical with our own case. In a well thought out opinion the Court held that the passage of the Act of June 25, 1930, did not validate a pledge previously made as to deposits made before the act. It is a clear cut case that clashes in no particular with the general run of Federal Court decisions.

In conclusion it is respectfully urged that had the Congress of the United States intended the Act of June 25, 1930, to act retroactively they would have so indicated and to hold that the Amendatory Act validated a pledge made in 1928 to secure deposits made in 1928 would be to give to the act a retroactive interpretation, nullifying vital provisions of the National Bank Act relating to distribution of assets of insolvent banks.

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